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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DONNA K. PHARRIS et al., Plaintiffs and Appellants, v. CITY OF LANCASTER, Defendant and Appellant.	B203065 (Los Angeles County Super. Ct. No. MC016732)

APPEALS from orders of the Superior Court of Los Angeles County. Paul Gutman, Judge. Order reversed with directions and order of dismissal vacated. Appeal by City of Lancaster dismissed.

Matison & Margolese, Vana Parker Margolese, Wayne Hunkins; Cheong, De Nove, Rowell & Bennett and John Rowell for Plaintiffs and Appellants.

Stradling Yocca Carlson & Rauth, Allison E. Burns and Jennifer Yu for Defendant and Appellant.

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Plaintiffs, 30 individuals, seek damages for physical ailments and other injuries allegedly caused by exposure to hazardous waste materials on a waste disposal facility on private property in the City of Lancaster (City) and operated by Smith & Thompson Pumping Co. (S&T Pumping) and other defendants. City allegedly was a generator of waste materials and paid S&T Pumping to remove and dispose of its waste. After the court sustained without leave to amend City's demurrer to plaintiffs' negligence claim, City was dismissed from the action. Plaintiffs appeal from the order of dismissal. City appeals from the order relieving plaintiffs from the claim presentation requirement of Government Code section 911.2 and permitting them to file their action against City. Because the trial court erred in relieving plaintiffs from the claim presentation requirement, we reverse that order and vacate the order of dismissal.[1]

BACKGROUND

A. Petition for Leave to File Action Against City

Plaintiffs filed this action against S&T Pumping and other defendants on September 2, 2005. On July 11, 2006, plaintiffs presented a claim to City, which was returned as untimely. On August 31, 2006, plaintiffs submitted an application with City for leave to file a late claim, which City denied in October 2006. Plaintiffs then petitioned the superior court in December 2006 for leave to file an action against City. They argued that, under the delayed discovery doctrine, their claim was timely because they did not discover City's alleged wrongful conduct until they received City records in March 2006, after submitting a request for records to City on January 22, 2006. Plaintiffs

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[1] Failure to timely present a claim for damages to a public entity bars a plaintiff from filing a lawsuit against the entity. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.)

Government Code section 911.2 requires that a claim relating to a cause of action for death or personal injury be presented within six months after the accrual of the cause of action. (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 63.) City filed a "cross-appeal" from the trial court's order granting plaintiffs relief from the claim presentation requirement. But "[a]n order granting relief is not appealable, but may be reviewed on appeal from a judgment or appealable order on the cause of action stated in the claim." (*Id.* at p. 64.) Accordingly, we dismiss City's appeal.

asserted that the presentation of their claim to City in July 2006 was within the six-month period required by Government Code section 911.2.

Plaintiffs also argued that if the delayed discovery doctrine did not apply, their delay was due to mistake, inadvertence, surprise, or excusable neglect in reasonably believing that such doctrine applied and that City was not prejudiced by the failure to present a timely claim pursuant to Government Code section 911.6, subdivision (b)(1).[2] Attached to the petition were copies of the claim and plaintiffs' petition to the City for leave to present a late claim. Plaintiffs' attorney submitted a declaration with the following substantive provisions: "1. The facts and dates stated in the pleadings and files submitted concurrently herewith are a true and accurate account of the circumstances leading up to the filing of this motion. [¶] 2. The exhibits attached to this petition are true and accurate copies of the pertinent administrative claim forms filed with the City . . . as well as its response letter denying said claim." The declaration of plaintiffs' attorney does not separate the claimed facts from the arguments in the incorporated points and authorities. It is impossible to determine what "facts and dates" in the file are within the personal knowledge of the attorney.

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[2] Government Code section 946.6 provides in pertinent part: "(c) The court shall relieve the petitioner from the requirements of Section 945.4 [necessity for written claim to be acted upon or deemed denied] if the court finds that the application to the board under Section 911.4 [application to present late claim] was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 and was denied or deemed denied pursuant to Section 911.6 and that one or more of the following is applicable: [¶] (1) The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4."

Government Code section 911.4, subdivision (b) provides: "The application shall be presented to the public entity as provided in Article 2 (commencing with Section 915) within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim. The proposed claim shall be attached to the application."

In opposition to the petition, City argued that the delayed discovery doctrine does not apply to a failure to discover the identity of an alleged wrongdoer and that plaintiffs could not justify their delay on the ground that City failed to provide records because they knew they had sustained injury without access to City's records. In their reply, plaintiffs explained that they were not relying on the lack of records as the basis for excusable neglect but on their reasonable, but possibly mistaken, belief that the delayed discovery doctrine was applicable.

The court granted plaintiffs' petition in January 2007, finding that "plaintiffs have been reasonably diligent in complying with Government Code 946" and that "the court doesn't see any prejudice to [City] in this case."

In February 2007, a first amended complaint was filed identifying City as Doe 4.

B. Second Amended Complaint and Demurrer

After City's demurrer to the negligence cause of action in the first amended complaint was sustained with leave to amend in May 2007, plaintiffs filed a second amended complaint (complaint).

The negligence cause of action of the complaint alleged that City failed to "profile" or identify its hazardous waste, in violation of Health and Safety Code section 25189.5,[3] California Code of Regulations, title 18, section 66262.11, and Code of

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[3] Unless otherwise specified, statutory references are to the Health and Safety Code.

Section 25189.5 provides: "(a) The disposal of any hazardous waste, or the causing thereof, is prohibited when the disposal is at a facility which does not have a permit from the department issued pursuant to this chapter, or at any point which is not authorized according to this chapter. [¶] (b) Any person who is convicted of knowingly disposing or causing the disposal of any hazardous waste, or who reasonably should have known that he or she was disposing or causing the disposal of any hazardous waste, at a facility which does not have a permit from the department issued pursuant to this chapter, or at any point which is not authorized according to this chapter shall, upon conviction, be punished by imprisonment in a county jail for not more than one year or by imprisonment in the state prison. [¶] (c) Any person who knowingly transports or causes the transportation of hazardous waste, or who reasonably should have known that he or she was causing the transportation of any hazardous waste, to a facility which does not

Federal Regulations, title 40, section 262.11.[4] City demurred to the second amended complaint on the ground that government entity tort liability requires a statute imposing a

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have a permit from the department issued pursuant to this chapter, or at any point which is not authorized according to this chapter, shall, upon conviction, be punished by imprisonment in a county jail for not more than one year or by imprisonment in the state prison. [¶] (d) Any person who knowingly treats or stores any hazardous waste at a facility which does not have a permit from the department issued pursuant to this chapter, or at any point which is not authorized according to this chapter, shall, upon conviction, be punished by imprisonment in a county jail for not more than one year or by imprisonment in the state prison. [¶] (e) The court also shall impose upon a person convicted of violating subdivision (b), (c), or (d), a fine of not less than five thousand dollars ($5,000) nor more than one hundred thousand dollars ($100,000) for each day of violation, except as further provided in this subdivision. If the act which violated subdivision (b), (c), or (d) caused great bodily injury, or caused a substantial probability that death could result, the person convicted of violating subdivision (b), (c), or (d) may be punished by imprisonment in the state prison for one, two, or three years, in addition and consecutive to the term specified in subdivision (b), (c), or (d), and may be fined up to two hundred fifty thousand dollars ($250,000) for each day of violation. [¶] (f) For purposes of this section, except as otherwise provided in this subdivision, 'each day of violation' means each day on which a violation continues. In any case where a person has disposed or caused the disposal of any hazardous waste in violation of this section, each day that the waste remains disposed of in violation of this section and the person has knowledge thereof is a separate additional violation, unless the person has filed a report of the disposal with the department and is complying with any order concerning the disposal issued by the department, a hearing officer, or court of competent jurisdiction."

[4] Title 22, section 66262.11 of the California Code of Regulations (Regulation 66262.11) provides: "A person who generates a waste, as defined in section 66261.2, shall determine if that waste is a hazardous waste using the following method: [¶] (a) the generator shall first determine if the waste is excluded from regulation under section 66261.4 or section 25143.2 of the Health and Safety Code; [¶] (b) the generator shall then determine if the waste is listed as a hazardous waste in articles 4 or 4.1 of chapter 11 or in Appendix X of chapter 11 of this division. If the waste is listed in Appendix X and is not listed in articles 4 or 4.1 of chapter 11, the generator may determine that the waste from his particular facility or operation is not a hazardous waste by either: [¶] (1) testing the waste according to the methods set forth in article 3 of chapter 11 of this division, or according to an equivalent method approved by the Department pursuant to section 66260.21; or [¶] (2) applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used and the characteristics set forth in article 3 of chapter 11 of this division. [¶] (c) For purposes of compliance with chapter 18 of this division (commencing with section 66268.1), or if the waste is not listed as a hazardous

specific mandatory duty on the entity and none of the three provisions set out in the complaint imposes such duty. Plaintiffs filed opposition to the demurrer. After a hearing, the court sustained City's demurrer without leave to amend. Plaintiffs appealed from the order of dismissal. City appealed from the order relieving plaintiffs from the claim presentation requirement. (See fn. 1, *ante*.)

DISCUSSION

Putting aside the issue of whether the demurrer was properly sustained, we turn to the issue of whether the trial court properly granted plaintiffs relief from the claim presentation requirement and permitted them to file their action against City. The order relieving plaintiffs from the claim presentation requirement is reviewable as an intermediate ruling which "necessarily affects the judgment or order appealed from or which substantially affects the rights of a party." (Code Civ. Proc., § 906.)

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waste in article 4 (commencing with section 66261.30), in article 4.1 (commencing with section 66261.50), or in Appendix X of chapter 11 of this division, the generator shall determine whether the waste exhibits any of the characteristics set forth in article 3 of chapter 11 of this division by either: [¶] (1) testing the waste according to the methods set forth in article 3 (commencing with section 66261.20) of chapter 11 of this division, or according to an equivalent method approved by the Department under section 66260.21; or [¶] (2) applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used. [¶] (d) If the waste is determined to be hazardous, the generator shall refer to chapters 14, 15, 18, and 23 of this division for possible exclusions or restrictions pertaining to management of the specific waste."

Title 40, section 262.11 of the Code of Federal Regulations (Federal Regulation 262.11) provides in part: "A person who generates a solid waste, as defined in 40 CFR 261.2, must determine if that waste is a hazardous waste using the following method: [¶] (a) He should first determine if the waste is excluded from regulation under 40 CFR 261.4. [¶] (b) He must then determine if the waste is listed as a hazardous waste in Subpart D of 40 CFR part 261 . . . . [¶] (c) For purposes of compliance with 40 CFR part 268, or if the waste is not listed in subpart D of 40 CFR part 261, the generator must then determine whether the waste is identified in subpart C of 40 CFR part 261 by either: [¶] (1) Testing the waste . . . ; or [¶] (2) Applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used. [¶] (d) If the waste is determined to be hazardous, the generator must refer to parts 261, 264, 265, 266, 268, and 273 of this chapter for possible exclusions or restrictions pertaining to management of the specific waste."

"A cause of action accrues for purposes of the filing requirements of the Tort Claims Act on the same date a similar action against a nonpublic entity would be deemed to accrue for purposes of applying the relevant statute of limitations. (Gov. Code, § 901.)" (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 444, fn. 3.) Generally, the statute of limitations begins to run upon the occurrence of the last element essential to the cause of action, the elements being generically referred to as wrongful conduct, causation, and harm. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) The delayed discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Ibid.*) But the identity of the defendant is not an element of the cause of action and the delayed discovery rule does not apply to the failure to identify a defendant. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807; *Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 [ignorance of identity of defendant is not essential to claim and does not toll statute of limitations].)

Accordingly, plaintiffs cannot rely on the delayed discovery rule. Because plaintiffs filed a complaint in September 2005 against some defendants, their cause of action accrued at the latest in September 2005. Plaintiffs were required to present their claim to City at the latest in March 2006; they filed their claim in July 2006.

Government Code sections 911.6 and 946.6, subdivision (c)(1) (see fn. 2, *ante*) "provide relief for late claimants who file their claims against a public entity beyond the six-month filing period, if filed within a reasonable time not to exceed one year after the accrual of the cause of action, 'where the claimants established by a preponderance of the evidence that failure to present their claim on time was through mistake, inadvertence, surprise or excusable neglect.' [Citations.]" (*People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 43.)

"'Excusable neglect' is defined as the act or omission that might be expected of a prudent person under similar circumstances. [Citation.] It is not shown by the mere failure to discover a fact until it is too late; the party seeking relief must establish that *in the exercise of reasonable diligence*, he failed to discover it. [Citations.]" (*People ex*

rel. Dept. of Transportation v. Superior Court, *supra*, 105 Cal.App.4th at p. 44.) "Once retained, it is the responsibility of legal counsel to diligently pursue the pertinent facts of the cause of action to identify possible defendants." (*Id.* at p. 45.) "When there is a readily available source of information from which the potential liability of a government entity may be discovered, a failure to use that source is deemed inexcusable." (*Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1294.) And a misunderstanding by an attorney of a well-settled principle of law does not constitute excusable neglect. (*Tammen v. County of San Diego* (1967) 66 Cal.2d 468, 479.)

"The decision to grant or deny a petition for relief is within the sound discretion of the trial court but that discretion is not unfettered. It must be exercised in conformity with the spirit of the law. [Citation.] The general policy favoring trial on the merits cannot be applied indiscriminately so as to render ineffective the statutory time limits. [Citation.]" (*Department of Water & Power v. Superior Court*, *supra*, 82 Cal.App.4th at p. 1293.)

Plaintiffs attempted to show mistake or excusable neglect with the declaration of their attorney, who, as noted, stated only that the facts and dates stated in the pleadings and files were true and accurate accounts of the circumstances leading up to the filing of the petition. Because it is impossible to determine what "facts and dates" in the file are within the personal knowledge of the attorney, we disregard the declaration. "[D]eclarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded." (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.)

Our record contains no showing of mistake or excusable neglect sufficient to warrant relief from the claim presentation requirement. It was well settled long before this action was filed that ignorance of the identity of a defendant does not delay accrual of a cause of action, so counsel's reliance on the delayed discovery rule was not reasonable and does not warrant relief. Nor do plaintiffs show excusable neglect based on the theory that they were reasonably diligent in seeking to discover City's

involvement. Assuming that their claims accrued no earlier than September 2, 2005, when the action was filed, there is an insufficient showing that plaintiffs acted diligently from September 2005 to July 2006, when they presented their claim. Other than their attorney's declaration, which we disregard, plaintiffs offered no explanation as to why they waited until January 22, 2006, to request records from City. And after receiving the records from City in March 2006, there is no explanation as to why plaintiffs waited over three more months before they presented their claim on July 11, 2006. Under the circumstances of this case, there was an insufficient showing of mistake or excusable neglect sufficient to warrant relief from the claim presentation requirement.

As City had no burden of establishing prejudice until after plaintiffs made a prima facie showing of entitlement to relief (*Department of Water & Power v. Superior Court*, *supra*, 82 Cal.App.4th at p. 1297), we need not address the issue of prejudice.

DISPOSITION

The order granting plaintiffs' petition to file an action against the City of Lancaster is reversed and on remand the trial court is directed to enter a new order denying plaintiffs' petition. The order of dismissal on the demurrer is vacated. The appeal by the City of Lancaster is dismissed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.